## National Labor Relations Board



Midnight Rose Hotel & Casino, Inc.

**OPW Fueling Components** 

RC Aluminum Industries, Inc.

Schwickert's of Rochester, Inc.

# Weekly Summary of NLRB Cases

Division of Information	Washington, D.C. 20570	Tel. (202) 273-1991
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Argix Direct, Inc. (22-RC-12480; 343 NLRB No. 108) Ridgefield, NJ Dec. 16, 2004. The Board concluded, contrary to the Regional Director, that the Employer's truckdrivers (owner-operators) at its Ridgefield, NJ facility, are independent contractors rather than employees within the meaning of Section 2(3) of the Act. Among factors cited by the Board in making this finding, it noted the owner-operators personally own or lease their trucks and are responsible for the trucks' maintenance, repairs, and insurance. Accordingly, the Board reversed the Regional Director's Decision and Direction of Election and dismissed the petition. [HTML] [PDF]

To determine whether individuals are statutory employees or independent contractors, the Board applies the common law agency test and considers all the incidents of the individual's relationship with the employing entity. See *Roadway Package System*, 326 NLRB 842, 850 (1998); *Dial-A-Mattress Operating Corp.*, 326 NLRB 884, 892 (1998); *Slay Transportation Co.*, 331 NLRB 1292, 1293 (2000). The Board also considered the multifactor analysis set forth in Restatement (Second) of Agency, Sec. 220. After consideration of all the relevant factors, the Board determined that the facts weigh more strongly in favor of independent contractor status.

(Chairman Battista and Members Schaumber and Walsh participated.)

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Bricklayers (Cretex Construction Services, Inc.) (13-CD-720; 343 NLRB No. 110) Chicago, IL Dec. 16, 2004. Relying on the factors of collective-bargaining agreements, employer preference, employer past practice, and economy and efficiency of operations, the Board determined that Cretex Construction Services, Inc.'s employees represented by the Bricklayers are entitled to perform the precast concrete erection work for an elevated parking structure and dedicated busway route at Midway Airport in Chicago, Illinois. [HTML] [PDF]

(Chairman Battista and Members Schaumber and Walsh participated.)

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Sprint Communications d/b/a Central Telephone Co. of Texas (16-CA-21792-2, 21858; 343 NLRB No. 99) San Antonio, TX Dec. 13, 2004. Affirming the administrative law judge, Chairman Battista and Member Schaumber dismissed the complaint alleging that the Respondent violated Section 8(a)(5) of the Act by failing to furnish "Personnel Action Forms" prepared in connection with the discharges of four union officers/employees and (2) by instituting a change in the method of holding third-step grievance meetings such that the Respondent's employee relations specialist might participate via conference call, in addition to the physical presence of another management representative. Member Walsh dissented in part. [HTML] [PDF]

The judge found, and the majority agreed, that: (1) the "Personnel Action Forms" were not within the scope of information requested by Communications Workers Local 6174, and (2) the change concerning the physical presence of the employee relations specialist third step meetings was not "material, substantial or significant" so as to create a duty to bargain."

Dissenting in part, Member Walsh disagreed with the majority's finding that the Respondent did not violate Section 8(a)(5) by failing to produce notes recording statements made by employees during interviews conducted as part of the Respondent's factual investigation into alleged misconduct of four union officers/employees. He wrote: "In holding these notes to be protected work product, my colleagues disregard the universally followed principle that documents prepared in the 'ordinary course of business' or for 'other non-litigation purposes' are not protected work product. They thereby extend the work product doctrine beyond its intended scope and unjustifiably impair the ability of unions to protect their members' contractual and statutory rights."

(Chairman Battista and Members Schaumber and Walsh participated.)

Charges filed by Communications Workers Local 6174; complaint alleged violation of Section 8(a)(5). Hearing at San Antonio on Nov. 7, 2002. Adm. Law Judge Keltner W. Locke issued his decision Dec. 9, 2002.

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Detroit Newspaper Agency, d/b/a Detroit Newspapers (7-CA-38079, et al.; 343 NLRB No. 113) Detroit, MI Dec. 16, 2004. The Board granted the Charging Parties' and the General Counsel's motions for reconsideration of the Board's earlier Decision reported at 342 NLRB No. 24. The parties contended that the Board erred in focusing on whether the discriminatees were permanently replaced before or after the Unions' unconditional offer to return, and not on whether they were lawfully permanently replaced before they were discharged and, therefore, the Board inaccurately treated the discriminates as economic strikers rather than as unlawfully discharged strikers. In agreement with the Charging Parties' and the General Counsel's contentions that the Board inadvertently made a material error with respect to the appropriate remedy and order for the unfair labor practices found, the Board amended its decision accordingly. [HTML] [PDF]

In the prior Decision, the Board found, in relevant part, that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging a number of economic strikers, either without a good faith belief that they had committed strike misconduct or where the strikers had not in fact committed the acts relied upon for the discharges.

(Members Liebman, Schaumber, and Walsh participated.)

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Harborside Healthcare, Inc. (8-CA-30592; 343 NLRB No. 100) Beachwood, OH Dec. 8, 2004. The Board, in a 3-2 decision, reaffirmed long-standing Board precedent that pro-union supervisory conduct may be grounds for setting aside an election without there being an explicit threat of reprisal or promise of benefit. The majority was comprised of Chairman Robert J. Battista and Members Peter C. Schaumber and Ronald Meisburg. The dissenters were Members Wilma B. Liebman and Dennis P. Walsh. [HTML] [PDF]

The decision responded to a remand from the U.S. Court of Appeals for the Sixth Circuit in *Harborside Healthcare Inc. v. NLRB*, 230 F.3d 206 (2000). The appellate court decision criticized the Board for finding pro-union supervisory conduct non-objectionable using a legal standard that deviated from earlier standing Board precedent. The standard applied appeared to require an explicit threat of reprisal or promise of benefit for such conduct to be objectionable. In its decision on remand, the Board disavowed that standard as "represent[ing] a departure from established precedent" and the language of relatively recent Board cases that seemed to apply it. The Board then reaffirmed its established standard restating it to include the elements of the inquiry to be conducted in applying it. The restated two-part standard states:

- I. Whether the supervisor's pro-union conduct reasonably tended to coerce or interfere with the employees' exercise of free choice in the election. This inquiry includes: (a) consideration of the nature and degree of supervisory authority possessed by those who engage in the pro-union conduct; and (b) an examination of the nature, extent, and context of the conduct in question.
- II. Whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election, based on factors such as (a) the margin of victory in the election; (b) whether the conduct at issue was widespread or isolated; (c) the timing of the conduct; (d) the extent to which the conduct became known; and (e) the lingering effect of the conduct.

In determining whether the supervisory conduct affected the election outcome, the majority stated that it would consider, among other things, whether the employer opposed the union's campaign, including any anti-union statements by higher-level officials and whether the employer disavowed the pro-union supervisory conduct.

After emphasizing that it is incumbent on the Board to protect employees from the conduct of supervisors, whether pro-union or anti-union, which interferes with employees' freedom of choice, the Board modified prior Board law involving the supervisory solicitation of union authorization cards. In lieu of the then-existing rule that such solicitation is not objectionable unless it "contains the seeds of potential reprisal, punishment or intimidation," the Board adopted a rule that supervisory solicitation of union authorization cards is inherently coercive absent mitigating circumstances. The Board reasoned that a supervisor, by definition, has the power to affect the working life of employees, and the solicitation of cards affords the supervisor the opportunity to obtain a graphic illustration of who is pro-union and, by the process of eliminating non-signers, who likely is not. Therefore, employees solicited by a supervisor would reasonably be concerned that the "right" response will be viewed with favor, and a "wrong" response with disfavor.

In dissent, Members Liebman and Walsh criticized the majority for reaching far beyond the issue raised by the Sixth Circuit's remand--whether actual threats or promises are required to find supervisory taint. In their view, the majority abandoned well-established precedent and

declared a "restatement of the law governing pro-union conduct of supervisors" not sought by the court or the parties.

The dissent gave several reasons why the "new legal test" is problematic. First, it "minimizes the importance of . . . the employer's <u>anti-union</u> stance, which the Board has long recognized as limiting the impact of a pro-union supervisor's conduct":

In that context, a pro-union supervisor acts against his employer's direct orders, and always at the risk of lawful discharge. In most workplaces, employees have little to fear from such a supervisor: they need simply bring his actions to the attention of another manager.

The dissent described the majority's failure to recognize the centrality of that factor as "not evenhanded" but "arbitrary."

Second, the dissent strongly opposed the majority's restating of the law to treat as coercive pro-union supervisory conduct that the Board has previously recognized as legitimate. The dissent warned that the majority's ruling that supervisory card solicitation is inherently coercive "jeopardizes the outcome of many elections" because such solicitation tends to be by borderline supervisors, who may be unaware of their supervisory status until their conduct is challenged:

To avoid creating a basis for setting aside an election, unions must now avoid using any person who might later be found to be a statutory supervisor to solicit authorization cards . . . . If unions err on the side of caution, the number of potential card solicitors will be reduced significantly, excluding many people who might be natural leaders . . . . If, on the other hand, unions guess wrong, the results of many elections will be subject to challenge. Either way, employees who want union representation lose.

(Full Board participated.)

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Midnight Rose Hotel & Casino, Inc. (27-CA-17885-1; 343 NLRB No. 107) Cripple Creek, CO Dec. 16, 2004. Members Liebman and Walsh adopted the recommendations of the administrative law judge and held that the Respondent violated Section 8(a)(1) of the Act by interrogating employees about their union activities, sympathies, and desires and about the union activities, sympathies and desires of other employees, soliciting an employee to spy on the union activities of employee Maureen Ostler and to inform Respondent of his findings, and threatening employees with loss of jobs for seeking representation by Teamsters Local 537. The majority also found that the Respondent violated Section 8(a)(3) and (1) when it discharged employee Ostler. Member Schaumber dissented. [HTML] [PDF]

The majority noted that the issue before the Board is whether the judge correctly found that the Respondent discharged union activist Ostler in violation of Section 8(a)(3) and (1) because of her union organizing activities, rather than because of what the Respondent asserted was theft by Ostler stemming from her repeated clocking in as a bartender when she was in fact working as a cocktail waitress (which has a lower base wage rate than a bartender).

Member Schaumber wrote that that the record does not support the conclusion that the Respondent engaged in disparate treatment when it terminated Ostler. He contended that the evidence supports the Respondent's reasonable belief that Ostler was engaged in misconduct and that the Respondent acted on that belief, that the Respondent conducted an adequate investigation, and that the Respondent did not engage in disparate treatment by terminating Ostler for theft. In his view, the Respondent established by a preponderance of the evidence that it would have terminated Ostler for theft even in the absence of her protected concerted activity and that the decision to discharge Ostler was lawful.

(Members Liebman, Schaumber, and Walsh participated.)

Charge filed by Teamsters Local 537; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Denver on June 18-19, 2002. Adm. Law Judge James M. Kennedy issued his decision Dec. 16, 2002.

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OPW Fueling Components (9-CA-40071; 343 NLRB No. 111) Butler County, OH Dec. 16, 2004. Affirming the administrative law judge, the Board held that the Respondent violated Section 8(a)(3) of the Act by suspending Logan Cox on October 28, 2002, and by discharging him on November 8, 2002. Chairman Battista and Member Walsh found that the Respondent violated Section 8(a)(1) by threatening employees that if they continued to file charges with the NLRB, the Respondent would not bring work back into the plant. Dissenting in part, Member Schaumber wrote that he would not adopt the judge's finding that the Respondent violated Section 8(a)(1) by the alleged threatening statement. Instead, he would dismiss or remand the issue for reconsideration and issuance of a supplemental decision. [HTML] [PDF]

(Chairman Battista and Members Schaumber and Walsh participated.)

Charge filed by Logan Cox, an individual; complaint alleged violation of Section 8(a)(1), (3), and (4). Hearing at Cincinnati on Sept. 9, 2003. Adm. Law Judge John T. Clark issued his decision June 10, 2004.

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RC Aluminum Industries, Inc., and RC Erectors, Inc. (12-CA-21207, 21453; 343 NLRB No. 103) Dade County, FL Dec. 8, 2004. The Board agreed with the administrative law judge's conclusion that the Respondent violated the Act on several occasions following a Board election of June 21, 2000, by discharging union supporter Alba Huembes in violation of Section 8(a)(3)

of the Act, unlawfully transferring union supporter Pedro Nunez to more onerous work, but it clarified the judge's make-whole-remedy, and threatening Nunez with unspecified reprisals in violation of Section 8(a)(1). [HTML] [PDF]

Concurring in part and dissenting in part, Chairman Battista would find, contrary to his colleagues, that the General Counsel has failed to prove, by a preponderance of the evidence, that the Respondent discharged Huembes. He wrote: "Neither party disputes that Huembes' employment ended on November 16, as the checks state. What is in dispute is whether the termination was voluntary or not. The presence of the handwritten word 'termination' does little to answer this question. In sum, the check fails to establish that Huembes was *involuntary* terminated."

(Chairman Battista and Members Liebman and Meisburg participated.)

Charges filed by Iron Workers Local 272; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Miami, Nov. 26-28, 2001. Adm. Law Judge George Carson II issued his decision May 14, 2002.

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Schwickert's of Rochester, Inc. and Schwickert, Inc. (18-CA-16899, et al.; 343 NLRB No. 114) Rochester, MN Dec. 16, 2004. The Board adopted the recommendations of the administrative law judge and held that the Respondents violated Section 8(a)(5) of the Act by withdrawing from multiemployer bargaining; by withdrawing recognition from Roofers Local 96 and refusing to bargain with it; and by unilaterally implementing changes in terms and conditions of employment; and violated Section 8(a)(3) by constructively discharging five employees. [HTML] [PDF]

Members Liebman and Walsh also adopted the judge's finding that by Respondents violated Section 8(a)(1) by telling employees that they would no longer be represented by the Union and by providing employees with union resignation forms and envelopes in which to mail them. Chairman Battista disagreed with his colleagues on this issue. In his view, the Respondents' June 19, 2003 speech at which the employees were told that the Respondents had repudiated its bargaining relationship with the Union was lawful. Chairman Battista wrote: "Although the Board (and I) are today finding that this withdrawal of recognition was unlawful, this does not gainsay the point that the Respondents were reciting a true fact to their employees."

(Chairman Battista and Members Liebman and Walsh participated.)

Charges filed by Roofers Local 96; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Minneapolis on Feb. 4 and 5, 2004. Adm. Law Judge Mark D. Rubin issued his decision May 25, 2004.

#### LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Service Employees Local 1877 (Individuals) San Francisco, CA December 8, 2004. 20-CB-11984, et al.; JD(SF)-77-04, Judge Jay R. Pollack.

North Carolina Prisoner Legal Services, Inc. (an Individual) Chapel Hill, NC December 16, 2004. 11-CA-20238; JD(ATL)-60-04, Judge Pargen Robertson.

Rockford Powertrain, Inc. (Auto Workers [UAW] Local 803) Rockford, IL December 17, 2004. 33-CA-14570; JD-119-04, Judge Bruce D. Rosenstein.

Cadillac Asphalt Paving (Teamsters Local 247 and an Individual) Novi, MI December 16, 2004. 7-CA-46464, 46565; JD(ATL)-55-04, Judge Lawrence W. Cullen.

*Henshue Construction, Inc.* (Electrical Workers [IBEW] Local 150) Milwaukee, WI December 16, 2004. 30-CA-16818-1; JD(ATL)-63-04, Judge George Carson II.

*The Museum of Modern Art* (Office Employees Local 2110) New York, NY December 16, 2004. 2-CA-34355, 34714; JD(NY)-52-04, Judge Steven Davis.

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### NO ANSWER TO COMPLAINT

(In the following case, the Board granted the General Counsel's motion for summary judgment based on the Respondent's failure to file an answer to the complaint.)

Earthborn Masonry Constructors, LLC (Bricklayers Local 9) (7-CA-46945, 47043; 343 NLRB No. 106) Webberville, MI December 8, 2004. [HTML] [PDF]

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# LIST OF UNPUBLISHED BOARD DECISIONS AND ORDERS IN REPRESENTATION CASES

(In the following cases, the Board considered exceptions to and adopted Reports of Regional Directors or Hearing Officers)

## DECISION AND CERTIFICATION OF REPRESENTATIVE

Cincinnati Air Conditioning Co., Cincinnati, OH, 9-RC-17933, December 15, 2004 (Members Liebman, Schaumber, and Walsh)

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# (In the following cases, the Board adopted Reports of Regional Directors or Hearing Officers in the absence of exceptions)

#### **DECISION AND CERTIFICATION OF REPRESENTATIVE**

Alaska Cleaning Services, Inc., Trenton, NJ, 22-RC-12505, December 13, 2004 (Members Liebman, Schaumber, and Walsh)

#### DECISION AND DIRECTION OF SECOND ELECTION

*E-Z Bus, LLC*, Yonkers, NY, 2-RD-1511, December 17, 2004 (Chairman Battista and Members Liebman and Schaumber)

# DECISION AND DIRECTION[that Regional Director open and count ballots]

Bittersweet, Inc., Whitehouse, OH, 8-RC-16649, December 14, 2004 (Members Liebman, Schaumber, and Walsh)

Ampere Electric Contracting, Inc., Auburn, MA, 1-RC-21804, December 17, 2004 (Chairman Battista and Members Liebman and Schaumber)

Vista Manor Health Care Associates, LLC, d/b/a Vista Manor, Titusville, FL, 12-RD-974 December 17, 2004 (Chairman Battista and Members Liebman and Schaumber)

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(In the following cases, the Board granted requests for review of Decisions and Directions of Elections (D&DE) and Decisions and Orders (D&O) of Regional Directors)

Road & Rail Services, Inc., Newark, DE, 4-RC-20881, December 15, 2004

(Members Liebman, Schaumber, and Walsh)

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## **Miscellaneous Board Orders**

## **DECISION ON REVIEW AND ORDER REMANDING**

South Dakota Concrete Products, Billings, MT, 27-RC-8330, December 15, 2004 (Members Liebman, Schaumber, and Walsh)

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